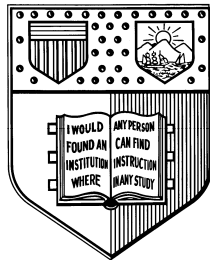


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### The WTO and Labor Rights: Strategies of Linkage

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## 10. The WTO and labor rights: strategies of linkage

**Chantal Thomas**

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### 1. INTRODUCTION

While the Members of the World Trade Organization ('WTO') have yet to adopt affirmative labor obligations, the link between trade and labor has been pressed in much academic and policy discourse.<sup>1</sup> The judicial body of the WTO has been called on to identify some of the contours of appropriate linkage between such 'nontrade' issues and WTO rules in a series of closely watched disputes. The holdings of these cases have shifted since the WTO's establishment in 1995, away from a deep suspicion about the propriety of linking trade with nontrade issues, and towards a nuanced view that accepts the validity of linkage as long as it meets certain formal parameters.

Some have applauded this shift, while others have excoriated it. As the shape of WTO jurisprudence on linkage has shifted, calls for resolution through political negotiations have increased. Some perceive a 'legislative' solution to offer greater legitimacy because it would represent a more 'democratic' solution negotiated by the entire membership, rather than a rule adjudicated by a panel of judges to resolve a dispute between particular members. Yet political negotiations are fraught with a host of separate problems. What might be called the 'decision costs' of a legislative solution are high, possibly prohibitively so.<sup>2</sup> A knotty problem arises for those concerned with linkage:

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<sup>1</sup> See generally Jagdish Bhagwati and Robert E Hudec (eds), *Fair Trade and Harmonization: Prerequisites for Free Trade?* (MIT Press, Cambridge, 1996); Symposium, 'Linkage as Phenomenon: An Interdisciplinary Approach' (1998) 19 *University of Pennsylvania Journal of International Economic Law* 201; Jose E Alvarez (ed), 'Symposium: The Boundaries of the WTO' (2002) 96 *American Journal of International Law* 1; Andrew Guzman, *Global Governance and the WTO* (manuscript on file with author). This draft builds on the author's previous work: Chantal Thomas, 'Should the World Trade Organization Incorporate Labor and Environmental Standards' (2004) 61 *Washington and Lee Law Review* 347.

<sup>2</sup> See generally Joel P Trachtman, 'Economic Analysis of Prescriptive Jurisdiction' (2001) 42 *Virginia Journal of International Law* 1 (describing the trans-

there seems to be an inverse relationship between perceived legitimacy, on the one hand, and decision costs on the other. The expense of negotiating a specific rule, the dangers of holdout and other strategic problems, and the specter of capture might all render the legislative option unfeasible; more seriously, they may threaten the very legitimacy that the legislation solution purports to provide.

This chapter considers the judicial and legislative responses to 'the linkage question' within the WTO. First, the chapter recounts why the question has arisen in the first place: the relative weakness of enforcement mechanisms within international labour law. Second, the chapter reviews the range of WTO judicial responses to unilateral linkage efforts by member states, considered under existing 'negative' provisions of WTO law – a law of exceptions that allows but does not mandate linkage. Third, the chapter considers the obstacles confronting the legislative response of defining the relationship between trade and labour policies through multilateral negotiations to create 'positive' labour obligations within the WTO.

## 2. INTERNATIONAL LABOUR LAW ENFORCEMENT MECHANISMS

The problem at the center of the 'trade linkage' question is the discrepancy between enforcement in the WTO regime and enforcement in other international legal regimes. This Part recounts the enforcement processes that have developed within international labor law and the challenges these processes continue to face.

Founded in 1919,<sup>3</sup> the International Labour Organization ('ILO') has established more than 180 binding conventions and 190 nonbinding resolutions on subjects ranging from human rights to occupational safety. Despite one of the oldest pedigrees in international law, however, the ILO's enforcement record has proved woeful.

An initial problem is that differing groups of countries have ratified different treaties, creating a patchwork of inconsistent legal obligations (although those conventions dealing with 'core' labour standards tend to have more uniform ratification). When a legal obligation does apply, moreover, the ILO's provisions for enforcement favor fact-finding and reporting over sanctions.<sup>4</sup>

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action costs attendant to 'prescriptive jurisdiction' transactions'). See also below, Part 4A.

<sup>3</sup> *Constitution of the International Labour Organization*, done at Versailles on 28 June 1919 ('*ILO Constitution*').

<sup>4</sup> Members are required to make annual reports as to their compliance with ILO

Although the ILO constitution authorizes sanctions in the event of noncompliance, the language is vague: 'In the event of any Member failing to carry out within the time specified the recommendations [. . .] any other Member may take against that Member the measures of an economic character indicated [. . .] as appropriate to the case.'<sup>5</sup>

As was the case with the trade regime prior to the WTO,<sup>6</sup> even with respect to the most egregious labor practices, the ILO's enforcement capacity has been severely constrained, as in the case of allegations of forced labor practices in the country of Myanmar (known formerly as Burma).<sup>7</sup> The international outcry against Myanmar sparked a movement for economic sanctions. This mobilization resulted in, among other things, the adoption of procurement policies by several state and local governments in the United States that penalized companies for doing business with Myanmar. Within the ILO, noncompliance proceedings were triggered.<sup>8</sup> As provided under the ILO constitution, a coalition of 25 'worker's delegates' from a cross-section of developed and developing countries brought a formal complaint.<sup>9</sup> The resulting Commission of Inquiry found extensive violations of the Forced Labour Convention, amounting to 'a saga of untold misery and suffering, oppression and exploitation of large sections of the population inhabiting Myanmar by the Government, military and other public officers'.<sup>10</sup> The Commission

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conventions to which they are parties. *ILO Constitution* Article 408. If a member fails to comply, the ILO can publicize that failure: *ILO Constitution* Article 410. A complaint can also be referred to a Commission of Inquiry, which can investigate and make findings and recommendations: *ILO Constitution* Articles 411–14. A member may then choose to pursue the matter further in the International Court of Justice ('ICJ'): *ILO Constitution* Articles 415–18.

<sup>5</sup> *ILO Constitution* Article 419.

<sup>6</sup> See John H Jackson, *The World Trading System: Law and International Economic Relations* (MIT Press, Cambridge, 2nd ed, 1995) 107–37 (comparing the historical processes for enforcement of GATT agreements with the improved WTO process implemented after the Uruguay Round).

<sup>7</sup> See 'Report of the Commission of Inquiry Appointed under Article 26 of the Constitution of the International Labour Organization to Examine the Observance by Myanmar of the *Forced Labour Convention*' (1998) 80 *ILO Official Bulletin*, 2 July 1998 (describing allegations made by the ILO that the Myanmar Government facilitated forced labor practices for both public and private purposes) ('Report of the Commission of Inquiry').

<sup>8</sup> See *Ibid* [1], [4] (documenting the series of ILO complaints and criticisms preceding the filing of a formal complaint and reporting on the action of the 267th meeting of the ILO Governing Body with respect to the filing of the formal complaint).

<sup>9</sup> *Ibid* [1], FN1 (listing the 'workers' delegates': Lebanon, Ghana, Pakistan, France, United Kingdom, Sweden, Germany, Czech Republic, United States, Japan, Israel, Italy, Niger, India, United Republic of Tanzania, Canada, Ireland, Venezuela, Malaysia, Tunisia, Mexico, Zimbabwe, Cameroon, Barbados, and Poland).

<sup>10</sup> *Ibid* [543].

condemned the 'impunity with which government officials, in particular the military, treat the civilian population as an unlimited pool of unpaid forced laborers and servants at their disposal'.<sup>11</sup> In response, the International Labour Conference ('ILC') voted in 2000 to compel Myanmar compliance with *ILO Convention No 29*<sup>12</sup> on forced labor,<sup>13</sup> taking the unprecedented step of utilizing Article 33 of the *ILO Constitution* in the process,<sup>14</sup> a procedure reserved only for the most grave and persistent violation of international labor law. The 2000 measures were reiterated by the ILO Governing Body in 2005 due to continued recalcitrance from Myanmar.<sup>15</sup> In early 2007 the Myanmar junta concluded a Supplementary Understanding<sup>16</sup> with the ILO, which implemented on a trial basis the requested mechanism of addressing complaints over forced labor.<sup>17</sup> The gaoling of a local labor activist in September 2008 threw doubt on the government's compliance with this Understanding.<sup>18</sup> This painfully slow progress indicates that even the ILO's strongest weapon has not compelled a swift or appropriate response from the target State.

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<sup>11</sup> Ibid [542].

<sup>12</sup> *Convention concerning Forced or Compulsory Labour (ILO No 29)*, opened for signature 28 June 1930, 39 UNTS 55 (entered into force 1 May 1932). Myanmar (then Burma) ratified this instrument in 1955.

<sup>13</sup> See generally ILO, 'International Labour Conference adopts Resolution targeting forced labour in Myanmar (Burma)' (Press Release, 14 June 2000). See also Gustavo Capdevila, 'Burma: ILO Gets Tough on Forced Labour' *Inter-Press Service* (Online/Rome), 16 November 2006, IPS, <http://ipsnews.net/news.asp?idnews=35506> at 3 January 2009.

<sup>14</sup> Article 33 reads: In the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Inquiry, or in the decision of the International Court of Justice, as the case may be, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith.

<sup>15</sup> See ILO, 'Burma/Myanmar at the ILO Governing Body' (Press Release, 24 March 2005).

<sup>16</sup> See *Supplementary Understanding* (26 February 2007) ILO, [http://www.ilo.org/public/english/region/asro/yanon/docs/supplementary\\_understanding.pdf](http://www.ilo.org/public/english/region/asro/yanon/docs/supplementary_understanding.pdf) at 3 January 2009.

<sup>17</sup> In particular, the instrument required that alleged victims of forced labor in Myanmar be given full freedom to submit complaints to the ILO Liaison Officer in Yangon and that no retaliatory measures could be taken against complainants: ILO, 'ILO concludes Understanding with Myanmar' (Press Release, 26 February 2007).

<sup>18</sup> See ILO, 'ILO expresses concern over sentencing of Myanmar labour activist' (Press Release, 19 September 2008).

### 3. THE JUDICIAL BRANCH APPROACH: INCORPORATION THROUGH INTERPRETATION?

The framework agreement of the WTO contains preambular language that affirms the importance of labour protections.<sup>19</sup> The Preamble recognizes that states' 'relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand'.<sup>20</sup> Beyond stating these general principles, however, the *Marrakesh Agreements* do not contain affirmative obligations to uphold labor standards. They do, however, create room for states on their own to take measures that restrict trade in order to implement social regulations.

A pivotal question in WTO jurisprudence is how much room exists under these provisions. WTO members have pursued a host of claims testing WTO law on some salient touchstones of the linkage debate. The WTO judiciary's responses have come under fire from both sides of the debate – charged at once with going too far to protect states' rights under nontrade law and not going far enough.<sup>21</sup> Some have charged the WTO Appellate Body with undue judicial activism.<sup>22</sup> Others argue that WTO judges can and should allow states

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<sup>19</sup> *Marrakesh Agreement Establishing the WTO*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) ('*Marrakesh Agreement*').

<sup>20</sup> This language reproduces that of the 1947 *General Agreement on Tariffs and Trade*, opened for signature 1 January 1948, 55 UNTS 194 (entered into force 1 January 1948) Preamble ('GATT'): *Marrakesh Agreement* Preamble. A contrarian might argue that labor protections create 'rigidity' in the labor market, preventing full employment, so that the preamble could be read to justify the rejection, rather than the adoption, of labor protections. This familiar argument follows supply and demand but is also qualified by key assumptions. In the case of a wage increase, for example, one must assume that other variables remain constant, so that labor productivity does not increase to offset the increase in production cost, and the employer cannot regain the increase in production costs by increasing market prices. Note that this also assumes a competitive market, which prevents the employer from being able to raise prices, and that the employer was operating at a marginal labor product of zero. When the wage increases, employer demand for labor will decrease (by the amount required for the employer to recover a marginal labor product of zero). Consequently, although those employed will benefit from higher wages, the overall number of employees will be fewer. However, the reference to raising standards of living seems to make clear that what is sought is not simply full employment, but full employment that improves quality of life.

<sup>21</sup> See Susan Esserman and Robert Howse, 'The WTO on Trial' (2003) 82 *Foreign Affairs* 130, 133–4 (discussing the positions taken by 'antiglobalization advocates and doctrinaire free traders' against judicial activism).

<sup>22</sup> See Jagdish Bhagwati, 'Afterword: The Question of Linkage' (2002) 96 *American Journal of International Law* 126, 133–4 (stating that the WTO Appellate Body should avoid making drastic changes to international trade law).

to invoke international law to defend pro-labour trade restrictions.<sup>23</sup> An examination of WTO jurisprudence on some high-profile controversies reveals a range of interpretive possibilities in the conflict between trade rules and nontrade rules.

### **A. The General Exceptions of Article XX GATT**

The most prominent set of 'non-trade' social regulation allowances is found in Article XX of the GATT.<sup>24</sup> Entitled 'General Exceptions', Article XX recognizes that the social regulation objectives of governments may lead them to take measures that restrict trade in a way that contravenes other GATT rules. Article XX permits such measures if they survive a designated test. The Article XX test requires that the measure in question possess two qualities: first, it is demonstrably germane to the stated social objective; and second, it does not abuse basic GATT/WTO principles of nondiscrimination. The measure cannot be 'applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade'. This condition is referred to as the 'chapeau' because of its location in an introductory paragraph that sits atop several brief subclauses.

The second objective is met by incorporating language that the measure at issue be in a defined nexus with the social objective – either 'related to' or 'necessary to'. Relevant provisions here include those allowing measures that are 'necessary to protect public morals', 'necessary to protect human, animal or plant life or health', 'relating to the products of prison labour', and 'relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption'.

Apart from language in the preamble affirming 'full employment' and 'raising standards of living', however, WTO law contains no provisions that set out affirmative labor standards.<sup>25</sup> As with environmental standards, the potential

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<sup>23</sup> See Joost Pauwelyn, 'The Role of Public International Law: How Far Can We Go?' (2001) 95 *American Journal of International Law* 535, 566 (arguing that disputing parties should be allowed to invoke international laws found in sources outside of the WTO).

<sup>24</sup> See Article XX GATT (outlining the exceptions that derive from member states' police powers).

<sup>25</sup> The international trade regime initially envisioned after World War II would have explicitly incorporated labor standards. See *Havana Charter for an International Trade Organization*, done at Havana on 24 March 1948, Article 7 ('The Members recognize that unfair labour conditions, particularly in production for export, create difficulties in international trade, and, accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its terri-

for recognition comes mainly via exemption. That is, the exemption clauses may allow a State, in some circumstances, to impose restrictions on goods on the basis that they have been produced in breach of labor standards. Article XX sets out several clauses that might be considered to include labor standards, most explicitly Article XX(e) which allows members to maintain measures that are otherwise WTO-inconsistent if they 'relat[e] to the products of prison labour'. Article XX also contains more general clauses that could be applied to uphold labor standards. Article XX(a) provides an exemption for measures that are 'necessary to protect public morals', and Article XX(b) allows for measures that are 'necessary to protect animal or plant life or health'. All of these clauses are subject to the chapeau's conditions relating to arbitrary or unjustifiable discrimination or disguised protection.

An early case, *Belgian Family Allowances*, suggested that differences in the treatment of foreign goods based on labor standards would violate the trade regime's basic principles of nondiscrimination.<sup>26</sup> However, *Belgian Family Allowances* did not discuss the applicability of Article XX's exceptions. Robert Howse has ventured that, in the contemporary context, the 'public morals' exception of Article XX(a) could allow for such measures within the conditions established by the Article XX chapeau:

[T]here is an argument that the interpretation of public morals should not be frozen in time and that with the evolution of human rights as a core element in public morality in many post-war societies, the content of public morals extends to include disapprobation of labour practices that violate universal human rights.<sup>27</sup>

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tory.'). That movement failed, and US proposals for inclusion of labor standards in the GATT regime that ultimately developed apparently failed to win the approval of the other contracting parties. See Adelle Blackett, 'Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation' (1999) 31 *Columbia Human Rights Law Review* 1, 8, FN14 (quoting an informal proposal put forth by the United States to achieve fair labor standards as part of GATT); see also Janelle M Diller and David A Levy, 'Notes and Comments, Child Labour, Trade and Investment: Toward the Harmonization of International Law' (1997) 91 *American Journal of International Law* 663, 685-6 (discussing the failure to gain support for labor standards because of the difficulty of defining unfair competition). The issue arose periodically in subsequent GATT negotiation rounds, especially the Tokyo Round, which was the last before the GATT transformed into the WTO. See Clyde Summers, 'The Battle in Seattle: Free Trade, Labor Rights, and Societal Values' (2001) 22 *University of Pennsylvania Journal of International Economic Law* 61, 62-3 (2001) (discussing the history of failed efforts to include labor standards in the GATT negotiations).

<sup>26</sup> *Belgian Family Allowances*, GATT BISD, 1st Supp. GATT Doc DS/1S/59 (7 November 1952) (Report of the Panel) (finding that a Belgian measure that imposed a tax on government-procured imports from countries without a system of public allowances violated the Most-Favored-Nation Treatment rule of Article I GATT).

<sup>27</sup> Robert Howse, 'The World Trade Organization and the Protection of Workers' Rights' (1999) 3 *Journal of Small and Emerging Business Law* 131, 192.



Howse's premise finds support in Joost Pauwelyn's contention that WTO rules must be read in conjunction with the larger body of public international law.<sup>28</sup>

## B. The SPS Agreement

Although the WTO has declined to take social regulations head on, its arena of operation has expanded to make that collision inevitable. During the Uruguay Round, members negotiated the *Agreement on Sanitary and Phytosanitary Measures* ('SPS Agreement'), which sought to create guidelines for the establishment of consumer health and safety regulations relating to imports.<sup>29</sup> The SPS Agreement expands upon GATT 1947 Article XX(I)(b) by providing that '[m]embers have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health'. It further elaborates that '[m]embers shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence'.

Viewed from one perspective, the SPS Agreement enables social regulation of trade; it seems to imply that if a country follows the SPS Agreement, its social regulations will be free from challenge under the GATT/WTO. Critics of the SPS Agreement, however, argue that the SPS Agreement imposes pressure on governments to reduce or weaken their social regulatory framework.<sup>30</sup> This difference of opinion was never as visible as during the recent WTO dispute in which Canada and the United States brought a complaint against the European Community ('EC'), challenging the EC's import ban on beef produced with artificial growth hormones.<sup>31</sup>

The so-called *EC – Hormones* case became a lightning rod for concerns about the proper role of international trade law in constraining the social regu-

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<sup>28</sup> Pauwelyn, above n 23, 560.

<sup>29</sup> See *Marrakesh Agreement Establishing the WTO*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) Annex 1A (*Agreement on Sanitary and Phytosanitary Measures*) (recognizing the significance of sanitary and phytosanitary measures for health and trade).

<sup>30</sup> See, for example, Lori Wallach and Michelle Sforza, *Whose Trade Organization? Corporate Globalization and the Erosion of Democracy* (Public Citizen, Washington DC, 1999) 59–61 (recognizing that because the SPS Agreement only permits measures based on 'sound science', nations may be forced to ignore their cultural values).

<sup>31</sup> *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc WT/DS26/AB/R, WT/DS48/AB/R, AB-2000-11 (16 January 1998) [2] (Report of the Appellate Body) ('*EC – Hormones*') (stating that the EC measures were inconsistent with the SPS Agreement).

latory arm of member states. The EC argued that the import ban was imposed strictly in the interests of EC consumers. The complainants argued that the import ban played on consumer fears to justify protectionist measures that only benefited EC producers.

In the resolution of the dispute, the conflict between WTO law, as currently interpreted, and other realms of international law came into stark relief. The EC justified its 'zero tolerance' approach to artificial growth hormone in beef by reference to the 'precautionary principle'. The precautionary principle of international environmental law holds that if little is known about the health implications of a particular product or process, governments are justified in imposing very strict regulations as a precaution.

The Appellate Body ultimately rejected the EC's interpretation of the precautionary principle. The AB was careful to emphasize that its interpretation of the SPS agreement did not bar Member states from establishing levels of protection that were more restrictive than predominant scientific opinion might warrant. The Appellate Body did find, however, that when a Member chose to establish a higher level of protection, a 'risk assessment' that was based on scientific research was required to support it; invocation of the precautionary principle without such scientific support failed to meet the risk assessment requirement.

### C. Social Regulation or Disguised Protectionism? The Interpretive Dilemma and Challenges to Judicial Legitimacy

In the range of cases on social measures that have come before the WTO dispute settlement mechanism, few have survived. A careful reading of the Appellate Body opinions shows that in many cases it took issue not with the measure itself, but with the means by which that measure was implemented, calling for a process that was either less discriminatory or better supported by scientific evidence. Nevertheless, for many labour advocates, these outcomes suggested that reform was needed to strike a better balance between trade concerns and 'trade-related' social concerns. Ironically, from other quarters, the Appellate Body attracted criticism for being too generous to the concerns of social justice advocates. After the approval of the modified US measure protecting sea turtles, in *Shrimp – Turtle*<sup>32</sup> some trade analysts pronounced the Appellate Body captured by 'the persistent environmental lobbies of the North'.<sup>33</sup>

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<sup>32</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS/58/AB/R, AB-2001-4 (21 November 2001).

<sup>33</sup> Bhagwati, above n 22, 133.

The criticism directed towards the Appellate Body indicates the dilemmas it faces in balancing the trade principles of the WTO with social concerns that are both policy objectives of WTO members and principles of international labor law. Some scholars argue that WTO law must be read in conjunction with these latter principles.<sup>34</sup> Others worry that such consideration strains the legitimacy of the Appellate Body as a body charged with applying WTO law.<sup>35</sup>

In the *EC – GSP* case,<sup>36</sup> the Appellate Body came as close as it ever has to addressing whether governments could impose sanctions on the basis of labor rights issues. India charged that the EU illegitimately had imposed conditions on its Generalized System of Preferences ('GSP') benefits. These conditionalities related to labor, environment, and drug trafficking issues, but India ultimately withdrew its complaint regarding the labor and environment aspects. That India withdrew these aspects suggests that it may have felt that the Appellate Body was positioned to rule squarely in favor of the EU on this basis. Even with only the drug trafficking conditionalities in front of it, the Appellate Body held in favor of the EU's ability to impose conditionalities on its GSP benefits, although labor was not considered. The regime was found to be inconsistent but not because these policies were incorporated, but rather only because the EU had not incorporated them in a transparent way that treated similar countries similarly.<sup>37</sup>

An underlying controversy on the boundary between legitimate social regulation and illegitimate protectionism changes the debate over the propriety of judicial resolution of the linkage issue.<sup>38</sup> If one believes in the benefits of trade and the difficulty of convincing governments to lower barriers, the rationale for this suspicion gains some validity. With a deep suspicion of the protectionist impulses of governments in mind, the import-restricting measures relating to tuna, shrimp, refined gasoline, and beef (all of which have been

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<sup>34</sup> Pauwelyn, above n 23, 560.

<sup>35</sup> Guzman, above n 1.

<sup>36</sup> *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Docs WT/DS246/R (1 December 2003) (Report of the Panel) ('*EC – GSP Panel*') WT/DS246/AB/R, AB-2004-1 (7 April 2004) (Report of the Appellate Body) ('*EC – GSP Appeal*').

<sup>37</sup> In doing so, the Appellate Body adopted the 'substantive equality' model that had been part of the 'structuralist' agenda for reform of the New International Economic Order (see Raúl Prebisch, *The Economic Development of Latin America and Its Principal Problems* (United Nations, New York, 1950)) propounded by developing-country governments in the 1970s when the GSP was established. Ironically, although the principle of substantive equality drove the argument by developing-country governments for a GSP back then, in the *EC – GSP* case the substantive equality argument was adopted by the EU as respondent.

<sup>38</sup> Robert E Hudec, 'Science and "Post-Discriminatory" WTO Law' (2003) 26 *Boston College International and Comparative Law Review* 185, 190.

challenged in GATT or WTO disputes) begin to look like poorly disguised concessions to domestic industries seeking to stave off outside competition to the detriment of consumers and ultimately to the detriment of aggregate global welfare.

Public choice literature reminds us that it is quite possible – and, under certain conditions, likely – for governments to cater to narrow protectionist interests at the expense of the wider population.<sup>39</sup> An insistently rosy view of the motives of governments, therefore, is not particularly appropriate. The concern about disguised protectionism is a valid one.

Given that this concern is valid, a true interpretive dilemma arises. The WTO decision-making bodies seem prepared to err on the side of enabling trade rather than enabling trade-restricting social measures. A view driven by only labor concerns might, in a similar fashion, blindly support all such measures without considering their impact on foreign producers, domestic consumers, and the world economy.

The proper interpretive stance becomes much harder to strike if one accepts both that disguised protectionism is a danger and should be discouraged, and that social regulations are nevertheless a central function of the state that are supported and required by international labor law. However difficult this puzzle is, it is quite clear that this problem cannot be avoided. The growing importance of WTO law, and of concerns relating to international labor standards, requires that the question be faced head-on and with a willingness to consider novel approaches.

This Part has examined the reasons within WTO law that negotiation of affirmative obligations might be necessary to preserve the integrity of international labor law. In other words, labor standards might better be incorporated through legislation rather than adjudication. Andrew Guzman, too, has suggested that trade and nontrade linkage ‘be determined through a political process of negotiation rather than through the quasi-judicial dispute resolution processes of the WTO’.<sup>40</sup> The next Part looks at the basis for creating such obligations and some of the challenges that would accompany such an effort.

#### 4. INCORPORATION THROUGH LEGISLATION

This Part highlights issues that legislation of affirmative labor obligations would have to resolve. When the question of content is directly addressed, problems of form arise that are not evident simply by focusing on the question

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<sup>39</sup> See below, Part 4A.2.

<sup>40</sup> Andrew T Guzman, ‘Trade, Labor, Legitimacy’ (2004) 91 *California Law Review* 885, 887.

from within WTO law. These problems reveal themselves when asking basic questions about constructing a set of positive rules. First, what obligations would such an agreement impose? Second, how would such obligations be enforced in the WTO system? Beyond such questions of form, however, there is the question of the substantive propriety of incorporating nontrade issues into the international trade regime. This Part observes concerns that could be raised with respect to each of these questions, but finds that these concerns by themselves should not bar pursuit of incorporation of labor standards into the WTO regime.

### **A. Theories of Legislative Decision-making as Applied to Trade-Labour Linkage**

In determining the labor obligations to be incorporated, negotiating parties would confront several kinds of costs. As Joel Trachtman has observed, the negotiation of rights and obligations entails a host of costs.<sup>41</sup> The most immediate source of such costs would be the allocation of resources required to achieve greater specificity through negotiation and drafting. In addition, however, the negotiation and drafting of specific rules would be susceptible to strategic behavior that, whatever its potential benefits, might also impose costs. This Part elaborates on each of these basic insights.

#### **(a) Negotiation and drafting issues**

Critics have faulted these public international law rights for their failure to follow traditional form. Consideration of the classical contours of legal entitlements yields the conclusion that a right yields a corresponding obligation on another party. Take the right to work.<sup>42</sup> It may not be immediately clear whether this right generates specific individual claims or obligations broadly owed to collective populations.

In considering these difficulties, however, it should be noted that interna-

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<sup>41</sup> See Joel P Trachtman, 'Economic Analysis of Prescriptive Jurisdiction' (2001) 42 *Virginia Journal of International Law* 1, 51 (stating that rules cost more to develop than standards); see also Joel P Trachtman, 'The Domain of WTO Dispute Resolution' (1999) 40 *Harvard International Law Journal* 333, 350–6.

<sup>42</sup> See *Universal Declaration of Human Rights*, GA Res 217A (III), UN Doc A/810, 71 (1948) Article 23 ('Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.');

*International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 999 UNTS 3 (entered into force 3 January 1976) Article 6(1) ('The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts . . .').

tional trade law, particularly in its earliest and most fundamental documents, contains rules equally as broad and undefined in application as core rules of international labor law. For example, Article I GATT, viewed by many as the most important provision in the GATT/WTO regime, provides that all members must receive equal trade treatment from each other. Article III GATT provides that each member state must provide equal trade treatment to domestic and foreign producers. Through the dispute settlement system, member states have articulated and clarified the exact contours of the broad principles. As in constitutional law, the breadth of a principle may render it more, rather than less, suitable for elaboration through the settlement of disputes.

Another difficulty, at least as challenging, arises when one attempts to envision how the WTO's dispute settlement system as currently configured would enforce any core set of labor standards, assuming they could be identified. The complainant's standing to initiate a complaint in the system provides a significant problem.

At the international level, only governments may bring WTO disputes against another government. Typically, the complainant state alleges that the respondent state has, in violating one or more obligations under the GATT/WTO, caused 'nullification or impairment' of the complainant's entitlements under the GATT/WTO. GATT/WTO complaints derive from an asserted harm imposed by one government on another government's nationals, whose interests their government then represents in a claim against the harm-imposing government. The conceptions of harm require more indirect conception of the wrong resulting from the violation of a right than normally is recognized. The enforcement of these rules by the international trade regime would require substantial expansion of the concept of a right beyond its traditional boundaries.

Once again, these problems are not insurmountable, but they do require a broad understanding of the harms that result from a violation of international labor standards. A member wishing to bring a DSB claim must allege that its rights under the WTO have been violated by another member's noncompliance. Rendering international labor law enforceable under the WTO also requires a broad conception of harm. If, as is most likely, the victims of a respondent government's violation were the respondent's own nationals, they could not bring a complaint against their own government in the WTO dispute settlement system. Rather, another WTO member government would have to challenge the practice. The complainant state would have to allege that the respondent's failure to, for example, eliminate child labor nullifies and impairs its benefits under the agreement.

Again, this principle of cross-national harm is not alien to international labor law. The foundational document of the ILO declares that 'the failure of any nation to adopt humane conditions of labor is an obstacle in the way of

other nations which desire to improve the conditions in their own countries'.<sup>43</sup> According to this principle, one WTO member could argue that another member's failure to honor child labor standards impedes its own ability to uphold child labor standards in its own territory. Indeed, this 'race to the bottom' argument animates much of the movement to set international labor standards. In the context of labor law, the argument concerns the economic impact of labor violations in one region on labor protections in another. The argument would be that a country's willingness to tolerate labor violations nullifies and impairs another country's protections by increasing the pressure on that country to tolerate similar labor abuses or risk losing investment to the violator.

Although empirical evidence may support some claims of indirect harm, it will undoubtedly not support all. It is of central importance to note that WTO law, however, does not require the strictures of empirically proved causation. Indeed, an important turning point for the interpretation of GATT/WTO standards was a Panel's conclusion that a complainant government did not have to show that the respondent government's violation of a rule resulted in an identifiable harm to the complainant government's nationals. Rather, the Panel adopted an irrebuttable presumption that any rule violation would necessarily harm the 'conditions of competition' for foreign nationals operating in the respondent government's market.<sup>44</sup> In this sense, the GATT/WTO regime has long departed from the traditional notion of a legal claim as requiring proof not only of the wrong, but also of the harm.

Based on the looser conception of actionability employed by the GATT/WTO, determining conceptions of harm required by international labor law will be less of a stretch. Under current GATT/WTO law, a complainant government argues that a respondent government's trade actions harm the 'competitive conditions' for the complainant government's nationals, established by trade. Under a trade-related labor agreement, the complainant government could argue that the respondent government's actions harm the 'conditions for securing labor standards' for its own nationals.

The issue of remedy poses similar problems. How would the WTO determine the appropriate remedy? How might the WTO measure the harm?

First, it is important to recall that the WTO dispute settlement system imposes a monetary penalty as a last resort only after the recalcitrant state has failed to reform its practices and policies satisfactorily within the stated time limit. Nevertheless, monetary penalties, in the form of suspension of conces-

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<sup>43</sup> *ILO Constitution* Part XIII.

<sup>44</sup> *United States – Taxes on Petroleum and Certain Imported Substances*, GATT BISD, 34th Supp, GATT Doc DS/34S/136 (17 June 1987) (Report of the Panel) [5.1.9].

sions by the adversely affected government, can be and are imposed under the WTO system.

At first, the problem of measuring the appropriate remedy for infraction of labor standards seems alarming. Quantifying the damage seems impossibly nebulous when compared with a hypothetical involving an inappropriate tariff. Upon closer examination, however, it turns out that similar problems of quantification already exist in the system. For example, the system provides a remedy when a country fails to impose intellectual property protection. When such a remedy takes the form of a monetary amount, it is determined through an evidentiary analysis similar to many instances of calculating damage awards. Moreover, the suspension of concessions need not take the form of a monetary amount; rather, it can take the form of the suspension of other obligations.

The above discussion demonstrates that, even if proponents of the establishment of WTO agreements on labor standards overcome the arguments against them, real problems of legal form will accompany any attempt to establish these standards. To begin with, issues of coherence may provide difficult problems in identifying core rules for incorporation. Problems relating to the specific content of such standards, even if they could be identified, would also arise. Finally, problems of standing would arise with any attempt to enforce these standards under the current WTO dispute resolution system.

The discussions above have indicated that the same problems of coherence, content, and harm identification are not confined solely to international labor law. They have historically plagued international trade law as well.<sup>45</sup> The fact

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<sup>45</sup> During the Uruguay Round, many governments of developing countries argued that the incorporation of intellectual property rights would yield disproportionate benefits to developed countries and disproportionate costs to them. See generally Ruth Gana Okediji, 'Copyright and Public Welfare in Global Perspective' (1999) 7 *Indiana Journal of Global Legal Studies* 117; Evelyn Su, 'The Winners and the Losers: The Agreement on Trade-Related Aspects of Intellectual Property Rights and Its Effects on Developing Countries' (2000) 23 *Houston Journal of International Law* 169. For an historical account of TRIPS in the context of international law, as well as an account of how TRIPS stacks up on social issues, including public health pandemics of particular concern to some developing countries, see James Thuo Gathii, 'Rights, Patents, Markets and the Global AIDS Pandemic' (2002) 14 *Florida Journal of International Law* 261. For a more general discussion of transfer of technology, see Chantal Thomas, 'Transfer of Technology in the Contemporary International Order' (1999) 22 *Fordham International Law Journal* 2096, 2105–11.

Many now argue that the incorporation of labor and environmental standards is no more than another strategy by industrialized countries to tip the market's scales in their favor: Bhagwati, above n 22, 127–8, writes:

By [the] test of mutual advantage [between developed countries and developing



that these difficulties of form have arisen in many different areas of international law demonstrates their prevalence in the challenge of constructing an international legal regime. The difference, therefore, is one of degree. Nevertheless, any attempt to establish affirmative labor obligations through the negotiation of WTO agreements would have to overcome these difficulties.

**(b) Negotiating skews, capture and challenges to legislative legitimacy**

The legislative incorporation of labor standards would confront numerous costs related to the identification and elaboration of relatively more specific rights and obligations than currently exist. The above discussion assumes, however, that given enough resources, an agreement that reflected the genuine aggregate preferences of member states would be possible. However, strategic dynamics might so skew negotiating tactics that this 'genuine' aggregation could be indeterminable, adding significantly to the challenge of negotiation.

An interest-aggregation, pluralist view of political decision-making, can decipher the WTO decision to include intellectual property – despite the existence of a 'competent body', the World Intellectual Property Organization ('WIPO') – but to exclude labor standards. To do so, however, pluralistic political decision-making must be qualified by public choice theory. In this view, when directly conflicting interests confront each other in a bid for political influence, the outcome is a product of the degree to which one interest can effectively crowd out the opposing view. A public choice model would suggest that to the extent that developed states support progress along nontrade lines, such support is secondary to and weaker than their support for trade goals. As such, it is questionable that labor and environmental standards would be pursued by developed states with intensity sufficient to produce the concessions necessary to gain their adoption.

A public choice perspective foregrounds awareness of state policy as the outcome of interaction between state actors and a host of interest groups, each with their own set of interests. A state's position on any given policy will be calculated to gain the maximum support from among potential sources of support. The distribution of preferences, *and* of preference intensities, among the state's constituencies will determine the state's position on a given issue.

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countries], the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ('TRIPS') does not belong to the WTO. It facilitates, even enforces with the aid of trade sanctions, what is in the main payment by the poor countries (which consume intellectual property) to the rich countries (which produce it) [. . .] We also demonstrated to the next set of northern lobbies that they could do the same. Thus, the unions now say: you did it for capital, so do it for 'nature'. And the poor countries that have no lobbies anywhere like the sumptuous ones such as the Sierra Club and the AFL-CIO now find themselves at the receiving end of a growing list of lobbying demands that the northern politicians are ready to concede.

Mancur Olson's classic study of trade protectionism,<sup>46</sup> which sought to answer why governments would adopt protectionist policies at the expense of public welfare, illustrates this dynamic (see Table 10.1). Olson argued that where the benefits of trade liberalization were widespread for consumers but also diffuse, and the costs of trade liberalization were limited but concentrated on producers, producers would have a greater incentive to organize in favor of a tariff than consumers would have to organize against it. A protectionist policy may well result even though the tariff's costs, in the aggregate, outweighed its benefits. One might dismiss Olson's analysis as counterfactual in light of the dramatic decreases in tariff levels over the post-World War II era. Surely the great gains in tariff reduction rehabilitate the possibility of legislation for the public benefit. An Olsonian logic would argue, however, that the reduction of tariffs only tracks the shift in the cost-benefit ratio of tariffs for producers. As technological advances enabled firms to capture lower production costs by moving manufacture offshore, tariffs ceased to become an attractive way of keeping competitors' goods *out of* the domestic market, and instead became a costly barrier to bringing one's own goods *into* the domestic market. Tariff reductions became possible, according to this logic, only when producer support for tariffs began to subside and producer opposition to tariffs began to grow.

The same dynamics that support trade liberalization, however, also raise red flags for 'non-trade' concerns. Assume, as I do, that stronger environmental, labor, human rights and competition policies *do* increase the public welfare. The benefits, although undeniable in the aggregate, are nevertheless relatively diffusely distributed. At the same time, such policies may raise production costs for many firms. Under Olson's analysis, industrial opposition to such policies will exceed public support for them under these conditions. If Olson's analysis is correct, firms who anticipate<sup>47</sup> significant costs from 'non-trade' policies will be organized to block such policies, see Table 10.2.

Table 10.1

<b>Policy proposal</b>	<b>Policy benefit</b>	<b>Policy cost</b>	<b>Maximum welfare if:</b>	<b>Policy benefit</b>
Tariff	Concentrated (for producers)	Diffuse (for consumers)	No tariff	Tariff

<sup>46</sup> Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press, Cambridge, 1965); *The Rise and Decline of Nations: Economic Growth, Stagflation and Social Rigidities* (Yale University Press, New Haven, 1982).

<sup>47</sup> A line of response here would argue that firms exaggerate or misunderstand the costs involved in these policies.

Table 10.2

<b>Policy proposal</b>	Policy benefit benefit	Policy cost	<b>Maximum welfare if:</b>	<b>Policy benefit</b>
Environmental protection	Diffuse	Concentrated (for producers)	Environmental protection	No environmental protection
Labour protection	Diffuse	Concentrated (for producers)	Labour protection	No labour protection

If Olson *is* correct, however, why have the United States and the European Union, for example, come out in favor of labor and environmental policies in WTO negotiations? Olson would guide us towards an examination of the relative costs and benefits of such stated policies in light of domestic interest group dynamics. The European Union's relatively energetic support for environmental regulation, one can argue, stems from the higher utility of 'Green' policy for the EU public at large; and possibly also from the relatively lower costs for expression of preferences on a very broad and public scale such as in the European Parliament. With stronger support for Green politics, preference *for* environmental regulation begins to reach or even exceeds the intensity of firms' preferences *against* it. In the United States, by contrast, Green politics is much less well developed. Accordingly, US support for progress in international environmental law has ranged from weak to nonexistent. While interest groups have of course organized in favor of labor, environmental and other nontrade concerns, they remain largely outnumbered in the contest for policy influence within the WTO.

Turning from the interplay *within* states to the interplay *among* states, an extrapolated Olsonian logic would also worry that developed-country support for environmental and labor protections stems from a highly strategic understanding of negotiations under current conditions. Supporting such protections currently comes at little political cost to developed-country states because they know that opposition to labor and environmental negotiations will be so fierce among developing countries so as to forestall progress. Since the prospect of 'real' negotiations is nonexistent, there is no danger of angering industry, and at the same time the possibility exists to gain the support of labor and environmental groups.

If the foregoing is true, what would happen if formal departments for nontrade negotiations were established within the WTO? A public-choice prediction would augur a poor outcome. The impetus for such negotiations comes from the possibility of 'cross-issue transfers' – the kind of quid pro quo

that drove the negotiation of TRIPS<sup>48</sup> and GATS<sup>49</sup> in exchange for agriculture and textile concessions during the Uruguay Round. But according to Olson's logic, developed states would quickly realize that they do not want to strengthen nontrade commitments badly enough to make serious concessions. Might the European Union form an exception to this, at least in the area of environmental policy? The offsetting 'bill' for the EU, the quid pro quo, would likely be increased market access. Market access issues strike at the heart of the EU, however, and may trump its support for environmental policy.

To press the public choice argument, Olson would wager that the foregoing dynamics offer not only predictive but also descriptive value. As a descriptive matter, the public choice model may better explain past and present negotiations both in the WTO and in other venues such as the United Nations – and in particular, the failure of nontrade negotiations to produce institutionally significant results in any forum. In short, the very reasons why many nontrade regimes have failed to gain authoritativeness outside the WTO would also greatly impede the progress of nontrade negotiations within the WTO. Confronted with the challenge to 'walk the talk', and given the intensity of developing-country opposition to some kinds of 'nontrade' policies, developed states might well abandon such concerns.<sup>50</sup>

## B. The TRIPS Precedent

This Part makes the observation that the WTO's intellectual property ('IP')

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<sup>48</sup> *Marrakesh Agreement Establishing the WTO*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) Annex 1C (*Trade-Related Aspects of Intellectual Property Rights*) ('TRIPS').

<sup>49</sup> *Marrakesh Agreement Establishing the WTO*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) Annex 1B (*General Agreement on Trade in Services*) ('GATS').

<sup>50</sup> The example of TRIPS can be read as a strong counterpoint; Guzman, above n 40, relies heavily on TRIPS here (as I have elsewhere with similar objectives). International intellectual property law was weak prior to incorporation into the WTO, and strong afterwards. The transition supports the argument that the institutional context can generate important substantive consequences – the intuition that underlies all pro-linkage arguments. An Olsonian perspective would, however, raise questions about whether the institutional context was the independent variable. Under this perspective, the increased authoritativeness of international intellectual property did not *result* from the institutional shift into the WTO. Rather, *both* the institutional shift *and* the increased authoritativeness resulted from a relatively rapid and marked increase in the intensity of industry preferences for increased intellectual property protection. To follow through on the logic, without this underlying industry support, the institutional shift would not have happened, or if it did happen the negotiations would have been far less productive.

law has followed an arc similar to that recommended by advocates for WTO incorporation of labor obligations. A primary objective of the WTO's establishment in 1995 was to extend trade discipline to areas of international economic activity that had been excluded under the previous international trade regime of the GATT. The WTO retained the existing regime defined by the GATT and significantly expanded it. For example, agreements on intellectual property, such as TRIPS, and trade in services, such as GATS, resulted from this effort.

The rationale for a WTO agreement regulating trade in services is clear: services are a category of trade, just as goods are. By the time the Uruguay Round began in the 1980s, the importance of internationally provided services justified the inclusion of services in the regulatory scope of international trade law, an area previously concerned only with goods. The rationale for a WTO agreement regulating IP is quite another matter. Although countries can trade IP rights across borders in licensing and other rights transferring agreements, they need not trade such rights in order for the TRIPS Agreement to apply. The TRIPS signatories adopted the agreement because trade affects IP rights. The value of the IP right increases with the capacity of the right-holder to enforce it and decreases when the information can be accessed without going through the right-holder. The latter may occur because the producer is operating in a region where the right does not exist or is underenforced.

As with IP protection, labor standards can affect trade flows by affecting production costs for goods and services. Just as the value of an IP right will decrease if it can be evaded through trade, the value of a labor right will also decrease if evasion through trade is an option. Moreover, the rights themselves may erode, a phenomenon known as the 'race to the bottom'.

Without considering TRIPS, the trade versus nontrade distinction might appear to justify exclusion of labor standards. Considered in isolation, the institutional competence argument that the WTO should not incorporate labor issues because they are not themselves the subject of trade, even if they clearly influence and are influenced by trade, appears more persuasive. Upon consideration of TRIPS, however, this distinction finds itself on very shaky ground. TRIPS concerns itself primarily with IP rights not as a subject of trade, but as a body of standards that affect trade flows. In this respect, international IP law is indistinguishable from international labor law in its relation to trade. After considering the TRIPS Agreement, the trade versus nontrade distinctions fail to explain the exclusion of labor rights. The IP case shares other similarities with international labor law: the relevant international enforcement regime that had developed was relatively weak. In addition, GATT law harbored a 'negative' exception for IP law in Article XX, similar to those that might apply for labor standards, but the TRIPS signatories ultimately made the political decision to strengthen this early incorporation with clearer and more rigorous positive obligations.

Article XX GATT, the General Exceptions provision, contains clause (d) which allows governments to take trade-restricting measures necessary to enforce IP law.<sup>51</sup> If the General Exceptions measure does provide all the support necessary for governments to enforce trade-related measures that might restrict imports, presumably no need to negotiate TRIPS would have arisen. TRIPS was negotiated, however, notwithstanding both a recognition of IP protection in the GATT's General Exceptions provision and a well-developed body of existing international law outside of the GATT. The fact that negotiation occurred lends credence to the argument that some integration of affirmative obligations to labor standards is required for these standards' proper enforcement and that the current exceptions-driven regime is inadequate.

Legislating affirmative IP obligations required confronting problems of diffuseness and nonjusticiability. At first blush, these problems seem much less troublesome in international IP law. Enumerated procedures identify IP rights owed to the right-holder, for example, the right to 'prevent' others from 'making, using, offering for sale, selling, or importing'.<sup>52</sup> Every government who is a party to the agreement, which now includes all WTO members, owes these rights. The right generates entitlements to certain types of legal protections – the right to deploy the state's enforcement power to exclude others from using the IP to which the right attaches.

Hindsight should not obscure the fact that real difficulties of this sort arose in the drafting of TRIPS, however. Although the *Paris Convention*<sup>53</sup> and the *Berne Convention*<sup>54</sup> were paramount in international IP law, a number of other international agreements developed. The *Universal Copyright Convention*,<sup>55</sup> for example, was a parallel instrument to the *Berne Convention*. Moreover, contracting parties put into force several versions of the Paris and Berne conventions. As a result of these numerous agreements, states significantly disagreed as to which international IP obligations were fundamental. For

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<sup>51</sup> See Article XX(d) GATT (allowing for trade-restrictive measures 'necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to [ . . . ] the protection of patents, trade marks and copyrights').

<sup>52</sup> Article 28(1)(a) TRIPS.

<sup>53</sup> *Paris Convention for the Protection of Industrial Property*, opened for signature 20 March 1883, 828 UNTS 107, as last revised at Stockholm 14 July 1967, 828 UNTS 305 ('*Paris Convention*').

<sup>54</sup> *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, as last revised at Paris, 24 July 1971, 828 UNTS 221 ('*Berne Convention*').

<sup>55</sup> Opened for signature 6 September 1952, 943 UNTS 178 (entered into force 10 July 1974).

example, European states tended to regard the 'moral rights' of authors against degradation of their work under the *Berne Convention* as fundamental, whereas the United States did not.

In addition to the issue of uniformity of principles, serious problems arose because the vagueness of the principles allowed for substantial variation across countries. For example, although the *Paris Convention* established the basic principle of patent protection, it allowed for much more variation among member states than the specific obligations imposed by TRIPS. Indeed, the frustration of the United States at the lack of uniformity of IP protection abroad provided a major incentive for its pursuit of IP negotiations in the trade regime. Moreover, awareness of the lack of uniformity of protections was acute in the context of the TRIPS negotiations; the primary achievement of the negotiations was to resolve these differences and arrive at a single set of 'core' substantive standards.

A final distinction departs from any appeal to structural or substantive logic, but appeals purely to pragmatic considerations. Particularly in the wake of the WTO's newfound institutional rigor, many commentators worry about the increased likelihood that the international trade regime will reach a 'breaking point'.<sup>56</sup> The new WTO sets much loftier ambitions for institution-building than did the old GATT. Commentators worry that, while the GATT was flexible and therefore never broke, the WTO may be overly rigid and overshoot the mark in seeking to establish a 'legalistic' regime.<sup>57</sup> The result might be a backlash of states that would erode the precious legitimacy that the global regime has built up over the postwar era.

The jury is still out as to whether the WTO is institutionally viable over the long run. The dispute settlement system garnered early acclaim by resolving contentious issues between powerful members with relative success. The first new agreement-making meeting in Singapore went relatively smoothly and succeeded in making anticipated gains. However, the highly visible failure of the next ministerial conference in Seattle revived the old institutional concerns. The Seattle experience demonstrated that state sovereignty still had

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<sup>56</sup> See Robert E Hudec, 'The New WTO Dispute Settlement Procedure: An Overview of the First Three Years' (1999) 8 *Minnesota Journal of Global Trade* 1, 14 (anticipating that, because international legal systems depend on voluntary member government compliance, the WTO legal system cannot expect unanimous governmental compliance with its legal rulings).

<sup>57</sup> *Ibid* 12 (displaying skepticism that member countries will be receptive to greater legal discipline in the WTO system); Miquel Montaña i Mora, 'A GATT with Teeth: Law Wins over Politics in the Resolution of International Trade Disputes' (1994) 31 *Columbia Journal of Transnational Law* 103, 178 (explaining that some scholars have observed a preference for informalism in international economic law and observing that this preference explains the law's reluctance to employ rigid mechanisms).

bite; that is, if the member states desired, they could refuse to adhere to the built-in agenda, impeding the progressive development of the institution. Thus, the anticipated progress in negotiations on services, agriculture, and other areas failed to materialize.

Particularly in the wake of Seattle, one might argue that at some point institutional modesty is required: the addition of items to the negotiation agenda would be too taxing. There may be some validity to this perception. It does not justify, however, the special exclusion of labor concerns, as opposed to other issues that are placed on the agenda. For example, negotiations on competition policy would require reconciling many different and complex regulatory regimes, but WTO members continue to consider the possibility of framing an agreement on competition.<sup>58</sup> However, controversy and disagreement continue to run high over the matter, and formal efforts to frame an agreement have not begun.

In reviewing these political dynamics, one might notice that developing countries' interests, at least as commonly construed in this particular debate,<sup>59</sup> run counter to IP protection as well as to labor concerns. At the time of the Uruguay Round negotiations, many developing countries staunchly opposed the incorporation of IP rights. The argument sounded quite similar to those made in the context of labor debates. Developing countries argued that the administration of IP rights properly belonged to the United Nations organization traditionally charged with that duty, the WIPO.

General opposition to IP standards in developing countries resulted not in an absolute opposition to their incorporation, but rather in a quid pro quo approach. Having reconciled themselves to the need to establish a comprehensive trade regime, many developing countries sought to leverage their willingness to countenance IP negotiations for the purpose of including negotiations on sectors of interest to them. Textiles and agriculture were two such notable sectors. Trade groups in the United States, which had an interest in maintaining the status quo of high protectionist barriers to imports, staunchly opposed negotiations on both of these topics.

Were labor negotiations to begin, the quid pro quo approach would undoubtedly re-emerge. That is, if industrialized countries wanted better labor practices in poor countries, the industrialized countries would have to agree,

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<sup>58</sup> At the conclusion of their 1996 meeting in Singapore, WTO members agreed to 'establish a working group to study issues [ . . . ] relating to the interaction between trade and competition policy [ . . . ] in order to identify any areas that may merit further consideration in the WTO framework': see *Singapore Ministerial Declaration*, WTO Doc WT/MIN(96)/DEC (18 December 1996) [20].

<sup>59</sup> Of course, there are many reasons to believe that poor countries, or at least significant populations therein, stand to benefit from such protections.



at least partially, to fund the process of acquiring those practices. This approach has been a staple of recent international environmental law, in which the principle of environmental protection is now wedded to the goal of development in poor countries.<sup>60</sup>

Developing countries' resistance to linkage will likely continue as long as proponents of the trade-labor/environment linkage fail to construct cost-sharing arrangements, as in the case of labor regulations, or construct only partial arrangements, as in the case of environmental regulations. However, it is important to note that in many cases integrating trade and labor regulations would impose no new obligations on member states. Particularly with respect to the most salient international agreements on labor, most rich and poor countries have reached agreement. The fact that poor countries have already assumed these obligations seems to neutralize any legitimate protest on their part to integrating into a regime that might provide more effective enforcement.<sup>61</sup> However, as Jose Alvarez has argued, state accession to international law instruments is often conditional precisely on their relatively weak enforceability and the relatively high residual state autonomy to determine compliance.<sup>62</sup>

### C. The History of Legislative Action on Labor Rights

The establishment of the WTO in 1995 raised alarms for political actors, particularly in the global North, who became concerned that the extensively revamped and unprecedentedly rigorous institutional and enforcement struc-

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<sup>60</sup> See Edith Brown Weiss, 'Introductory Note', United Nations Conference on Environment and Development, 31 *ILM* 814, 814–15 (outlining areas of concern and priorities relating to sustainable development and implementing economic progress while using resources in a clean and efficient manner).

<sup>61</sup> See Clyde Summers, 'The Battle in Seattle: Free Trade, Labor Rights, and Societal Values', (2001) 22 *University of Pennsylvania Journal of International Economic Law* 61, 67. Summers argues that:

It is ironic that Egypt, Brazil, Indonesia and Pakistan, which were among those most vocal in opposing the [proposal to incorporate labour discussions into WTO talks in Seattle] have ratified conventions on all of these subjects, with the exception of Pakistan's failure to ratify a convention on child labour. They expressed outrage that [President] Clinton would suggest [in his proposal on labour] that they should be required to observe the conventions that they had ratified.

<sup>62</sup> See Jose E Alvarez, 'How Not to Link: Institutional Conundrums of an Expanded Trade Regime' (2001) 7 *Widener Law Symposium Journal* 1, 1 (noting that the WTO is rare among international law regimes because it usually 'secures at least procedural (if not always substantive) compliance').

ture of the new multilateral trade regime would accelerate a 'race to the bottom' brought about by globalization and accompanying regulatory competition. Within civil society, trade unions became the most organized and concentrated locus for this broad-based concern. By 1997, both the United States and British executives had been elected by constituencies that incorporated this concern, and those governments among others raised the question of incorporating labor standards directly into the WTO.

The early phase of the trade-labor linkage debate was characterized by a perception that the international labor law regime needed to 'harden' in order to be able to stand up to the trade regime. This impulse bore some resemblance to an earlier and more successful initiative to incorporate intellectual property standards into the WTO, precisely out of recognition that the existing United Nations-based structure provided inadequate enforcement. As Part 4B above suggests, at least theoretically, the establishment of a 'Trade-Related Labour Rights Agreement' similar to the TRIPS Agreement that was adopted by WTO members might have been possible.

The question of whether to incorporate labor standards was 'hard-fought' at the WTO's first two member-wide general assembly meetings, called Ministerial Conferences.<sup>63</sup> Nevertheless, a justification for exclusion on grounds of institutional competence emerged early on. At the first-ever Ministerial Conference, in Singapore in 1996, the WTO member governments adopted a declaration that formally established that 'the [ILO] is the competent body to set and deal with [labor] standards.'<sup>64</sup> While the *Singapore Declaration* endorsed the work of the ILO, it also took pains to clarify that differential labor costs should be viewed as an *advantage* rather than a social problem.<sup>65</sup>

After the issue was raised again at the next Ministerial, in Seattle, contributing to the disintegration of talks at that meeting, the 'hard linkage' strategy, the strategy to incorporate labor standards through 'transplanting' them into the WTO, would seem to have played itself out. A final, somewhat half-hearted effort at the next Ministerial Conference, led only to a reaffirmation of the Singapore conference's initial decision on the division of labor from trade.<sup>66</sup>

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<sup>63</sup> World Trade Organization, *Understanding the WTO* (WTO, Geneva, 3rd ed, 2007) 75.

<sup>64</sup> *Singapore Ministerial Declaration*, above n 58[4].

<sup>65</sup> *Ibid.* ('We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question.')

<sup>66</sup> *Doha Ministerial Declaration*, WTO Doc WT/MIN(01)/DEC/1 (20 November 2001) [8] ('We reaffirm our declaration made at the Singapore Ministerial Conference regarding internationally recognized core labour standards.')

In the meantime, the ILO tried to ‘harden’ itself. The WTO’s 1996 declaration that the ILO was the competent body for administering international labor law sparked a renewed effort by the ILO at consolidation and streamlining. One important result was the ILO *Declaration on Fundamental Principles and Rights at Work*.<sup>67</sup> The Declaration identifies the following four core labor standards:

- (a) freedom of association and the effective recognition of the right to collective bargaining;
- (b) the elimination of all forms of forced or compulsory labor;
- (c) the effective abolition of child labor; and
- (d) the elimination of discrimination in respect of employment and occupation.

The Declaration appears to be the ILO’s explicit recognition of the institutional challenge articulated by the WTO. It also appears to recognize that a critical aspect of meeting this institutional challenge was to articulate obligations that are finite and concrete rather than expansive and diffuse.

Although the *Doha Ministerial Declaration* reaffirmed the division of labor from trade, the period from the turn of the century to the present day demonstrates, beyond this ‘hard’ separation of formal law, that a variety of clues to a slowly changing institutional culture has emerged. Still very limited, they nonetheless indicate a permeation of *values* within the trade organization. The first indication here is the Joint ILO-WTO Study of 2007.<sup>68</sup> This study directly addressed the costs of trade liberalization on employment security, and acknowledged that trade liberalization could create both winners and losers. As such, it can be seen as a shift towards a shared vocabulary.

Surveying the history of actual legislative efforts at linkage bears out the theoretical prediction that direct action on the legislative front is beset with insurmountable difficulties arising from transaction costs and capture. Consequently, it is not surprising that proponents of linkage have shifted away from the effort at direct, formal, explicit incorporation of labor rights – ‘transplant’ – and towards a strategy of ‘osmosis’ in which labor rights values are incorporated by means that are diffuse but ultimately pervasive. What the

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<sup>67</sup> See *ILO Declaration on Fundamental Principles and Rights at Work*, 37 ILM 1233 (entered into force 19 June 1998) Article 2 (stating that all member states have an obligation to promote the four core labor standards).

<sup>68</sup> ILO and WTO Secretariats, *Trade and Employment: Challenges for Policy Research* (2007) WTO, [http://www.wto.org/english/res\\_e/booksp\\_e/ilo\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/ilo_e.pdf) at 3 January 2009.

osmosis strategy lacks in definite objectives, it makes up for in ambition, for it seeks no less than a transformation of 'consciousness'.<sup>69</sup>

This trend is supported more broadly by the general turn, largely initiated by scholars of international relations,<sup>70</sup> to the study of 'governance' rather than 'government'.<sup>71</sup> Three trends in particular are important: the disaggregation of regulatory practices and decisions into a series of interactions amongst both government and nongovernment actors with a wide range of interests;<sup>72</sup> a focus on the ways in which those interests are constructed by the identities, shaped in turn by social and cultural norms and ideals, of the actors involved;<sup>73</sup> and an emerging belief in the priority of international cooperation (rather than realpolitik conflict).<sup>74</sup> In sum, scholars have recognized the emerging importance of studying what I will call *cultures of governance*, in which mobilization for change by social movements and political actors unfolds in macrocosmic setting of interconnected but incongruous spheres of meaning and interest.

This last, a belief in the importance of cooperation, finds its juridical counterpart in work on 'legal pluralism' that announces, with palpable anxiety,<sup>75</sup> the challenge posed to the international order by international legal regimes that are not integrated.<sup>76</sup> The puzzle of how to realize international law's 'presumption against normative conflict'<sup>77</sup> has perhaps yielded, in the absence

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<sup>69</sup> See also Chapter 2, pp. xxxx.

<sup>70</sup> Important early exceptions amongst US international law scholars include Louis Henkin and Harold Koh. See Louis Henkin, *How Nations Behave* (Columbia University Press, New York, 1979); Harold Hongju Koh, 'Transnational Legal Process' (1996) 75 *Nebraska Law Review* 181, 183–4.

<sup>71</sup> See, for example Joseph S Nye and John D Donahue, *Governance in a Globalizing World* (Brookings Institution Press, Washington DC, 2000).

<sup>72</sup> Andrew Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics' (1997) 51 *International Organization* 516.

<sup>73</sup> Alexander Wendt, *Social Theory of International Politics* (Cambridge University Press, Cambridge, 1999) 92–120.

<sup>74</sup> Robert O Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton University Press, Princeton, 1984) 49–64.

<sup>75</sup> G Hafner, *Risks Ensuing from Fragmentation of International Law*, UN Doc A/55/10 annex (2000).

<sup>76</sup> Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999, 1004 ('Global legal pluralism [. . .] is not simply a result of political pluralism, but is instead the expression of deep contradictions between colliding sectors of a global society').

<sup>77</sup> Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission*, UN Doc A/CN.4/L.682 (13 April 2006) [37]; see also Howse and Teitel, Chapter 2, footnote 3, citing same to advocate for '[r]econstructing globalisation on the basis of a human rights consciousness'.

of clear doctrinal solutions, an urgency to the project of resolving conflicts among spheres of international law by bringing colliding worldviews closer together. It is possible that this groundwork in the 'legislative' arena has in turn made decisions such as the *EC – GSP* case discussed above possible. The hypothesis here, which future research would hopefully bear out, is that a shifting institutional culture in the WTO will emerge which reaffirms formal institutional separation of trade and labor mandates but simultaneously moves towards a shared vocabulary that bridges that formal institutional gap, and creates an atmosphere of greater legitimacy for judicial interpretations that strengthen that bridge.

## 5. CONCLUSION

On reflection, this debate between the judicial and legislative responses to incorporation at an international level seems to parallel a tension between competing attributes of legitimacy in decision-making within domestic legal systems: expertise and independence on the one hand, versus accountability and representativeness on the other. Although the legislative response to linkage is politically more desirable, it appears to be less plausible. Judicial response may represent the best option, particularly at an early stage. Moreover, judicial response might have an 'action-forcing' effect, in which the relative benefit of codification through legislation increases over time to correct any deficiencies in the rules established by the legislature. However, potentially prohibitive decision costs might reduce overall welfare by barring collective action, resulting in the continuation of a rule that does not represent the aggregate preferences of the members and their respective constituencies.

On either side, however, the purported virtues can be seen as vices: one can regard the expertise of the judiciary as 'insider' bias, and the accountability of the legislature is susceptible to capture. Even more complexly, recently these charges of insider bias and capture have sometimes strayed outside their traditional realms: critics have charged the WTO judiciary with capture and the representatives of member states with insider bias. In the current 'Development Round' of WTO negotiations, the international debate on integrating trade and labor must determine not only the appropriate substance and form of the rule, but also the appropriate decision-making institution and process.